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INTRODUCTION

The existence of a special Delaware statute[1] concerning sequestration of stock in Delaware corporations was in the past the subject of a detailed scholarly analysis.[2] The novel feature

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[1] DEL. CODE tit. 8, § 169 (1974) provides:

> For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

[2] *See* Folk and Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749 (1973).

of the Delaware scheme is that it allows the attachment of the stock in Delaware corporations for purposes of securing *quasi in rem* jurisdiction[3] on a much broader basis than would be possible under relevant portions of the Uniform Commercial Code.[4] If only the desirability and validity of the Delaware statutes were involved, the excellent commentary on that subject already available[5] would make further analysis repetitious at best. However, recent decisions concerning the sequestration statute by the Delaware Supreme Court in *Greyhound Corp. v. Heitner*[6] and by the Court of Appeals for the Third Circuit in *U.S. Industries, Inc. v. Gregg*[7] involve implications which reach beyond both the borders of Delaware and the issue of stock sequestration. The decision of the United States Supreme Court in *Shaffer v. Heitner,*[8] which reversed the Delaware Supreme Court, extends those implications even further. It is probably not an overstatement to say that the decision in *Shaffer* is one of the landmark jurisdictional decisions of the past century.

Since the decisions of the state and federal courts in Dela-

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[3] This is the effect of the situs rule of DEL. CODE tit. 8, § 169 (1974), *supra* note 1, when coupled with the general attachment provisions of other sections of Delaware law. DEL. CODE tit. 10, § 366 (a) (1974) provides:

> If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. *The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear or otherwise defaults.* (Emphasis added).

[4] U.C.C. § 8-317(1)(1972 version) provides:

> No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

Delaware has never adopted the portion of the Code dealing with stock attachments.

[5] Folk and Moyer, *supra* note 2.

[6] 361 A.2d 225 (Del. 1976).

[7] 540 F.2d 142 (3rd Cir. 1976).

[8] 45 U.S.L.W. 4849 (1977).

ware came to opposite conclusions, Supreme Court review of one or both was inevitable. This article will attempt an analysis of the two decisions as they emerged from the lower courts. Particular attention will be paid to the question of whether the two decisions are as incompatible as they appear on the surface and to the handling of the Delaware case by the Supreme Court. This article will assess the wisdom of the path chosen by the Supreme Court, which severely restricted the traditional breadth of *quasi in rem* jurisdiction, and it will discuss the ramifications of such restrictions in areas other than that of sequestration. The discussion will focus primarily on the substantive due process aspects of these jurisdictional theories, yet most of the analysis and conclusions will have some relevancy to new notions of procedural due process as well.

I. THE LOWER COURT DECISIONS

Early in 1976, the Delaware Supreme Court decided the case of *Greyhound Corp. v. Heitner.*[9] The case involved a stockholders' derivative action against defendants who were serving or had served as directors of Greyhound during a specified period of time.[10] It was alleged on behalf of the corporation, which was incorporated in Delaware, that the directors had mismanaged the corporation to its detriment. More specifically, it was alleged that the directors had conducted themselves in a manner that exposed the corporation to antitrust liability, and that as a result of that conduct the corporation had been forced to pay antitrust damages.[11] Since none of the defendants were residents of Delaware, the action against them was commenced by the sequestration of stock and stock options they owned in Greyhound. Such sequestration was possible under the Delaware statutory provisions despite the fact that the physical presence of the stock was undoubtedly outside the physical boundaries of Delaware. Of some twenty-seven directors named as parties defendant, the sequestration of stock worked to bring in only nineteen, while sequestration of options brought in two additional defendants. The other six either had

[9] 361 A.2d 225 (Del. 1976).
[10] *Id.* at 228.
[11] *Id.* at 228-29.

never owned stock in Greyhound or had sold their stock prior to the commencement of the action.[12]

The heart of the argument by the directors, an argument which was to prevail in the Supreme Court and which will be the primary focus of this article, was that since none of the defendants had sufficient contact with Delaware for that state to exercise *in personam* jurisdiction over them constitutionally, neither could the state constitutionally exercise *quasi in rem* jurisdiction over them via sequestration, because such action would violate defendants' due process rights.[13] The Delaware Supreme Court, however, squarely rejected this contention. Taking a stand based primarily on the history of the *quasi in rem* jurisdictional basis, the court held that such jurisdiction was based not on any contact which the forum had with the defendants, but on the contact which it had with the stock in the Delaware corporation.[14] At this point no attempt will be made to analyze the legal rationale for the decision other than to note that it was based on traditional territorialist notions of jurisdiction founded in early American cases. Since the effect of those early precedents will be pivotal in examining the Third Circuit decision concerning sequestration and in examining the review of the Delaware Supreme Court decision by the United States Supreme Court, extended discussion will be postponed for the time.

An opposite result concerning the constitutionality of the Delaware sequestration statute was reached by the Third Circuit in *U.S. Industries, Inc. v. Gregg.*[15] In that case, Gregg, a Florida domiciliary, had entered into a contract in Florida with U.S. Industries (U.S.I.), a Delaware corporation having its principal place of business in New York. Pursuant to the contract, Gregg transferred to U.S.I. all of his stock in three Florida construction companies, one million dollars in cash, and a note for a half million dollars. In return Gregg received from U.S.I. a large block of U.S.I. common and preferred stock. The assets of the Gregg corporations were transferred from U.S.I. to

[12] Ownership of stock in the corporation is not necessary in order to serve as a director. DEL. CODE tit. 8, § 141(b) (1974).

[13] 361 A.2d at 229.

[14] *Id.*

[15] 540 F.2d 142 (3rd Cir. 1976).

Diversicon, a Florida corporation with its principal place of business in Florida. Gregg helped in Diversicon's operation of the construction companies.

Subsequent to this transaction, U.S.I. and Diversicon became dissatisfied with the dealings. Alleging that Gregg had misled them in setting up the original transaction and that he had violated his duties as an officer of Diversicon by taking for himself business opportunities which should have gone to Diversicon, U.S.I. and Diversicon instituted suit against Gregg in Delaware state court, and proceeded by attaching the stock which Gregg owned in U.S.I.[16] Following removal to federal district court,[17] Gregg objected to the sequestration of his stock on the grounds that he lacked sufficient contact with Delaware for that state to exercise jurisdiction over him. The argument advanced by Gregg was like that seen in *Shaffer*,[18] *viz.*, since the state lacked *in personam* jurisdiction over him, it could not exercise *quasi in rem* jurisdiction over him through the sequestration of his stock. Gregg was able to make very compelling arguments based on the fact that his stock certificates were physically located in Florida and had been pledged as collateral for a bank loan in Florida. Despite this fact, however, the federal district court ruled that such sequestration was permissible,[19] relying on much of the same authority used by the Delaware Supreme Court in *Shaffer* to conclude that *in personam* jurisdictional restrictions had no relevance to a case in which jurisdiction was predicated upon *quasi in rem* theories.[20]

The federal district court's decision in *Gregg* is clearly consistent with the holding of the Delaware Supreme Court in *Shaffer*. The federal opinion was, however, reversed on appeal

[16] U.S. Indus., Inc. v. Gregg, 348 F. Supp. 1004, 1009 (D. Del. 1972).

[17] U.S. Indus., Inc. v. Gregg, 58 F.R.D. 469 (D. Del. 1973).

[18] Both the Delaware Supreme Court decision and the United States Supreme Court decision will be referred to hereinafter by this single name.

[19] 348 F. Supp. at 1020.

[20] It might also be noted that, in addition to holding that Gregg's substantive due process objections were unfounded, the court rejected Gregg's arguments for procedural due process safeguards based on the line of cases beginning with Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). The basic thrust of Gregg's argument was that there should have been notice and a hearing prior to the attachment.

The application of *Sniadach* protections to *quasi in rem* jurisdiction was rejected by the Third Circuit in Lebowitz v. Forbes Leasing and Fin. Co., 456 F.2d 979 (3rd Cir.), *cert. denied*, 409 U.S. 843 (1972).

to the Third Circuit.[21] The court unanimously ruled that the *in personam* jurisdictional standards required by the line of cases beginning with *International Shoe Co. v. Washington*[22] precluded Delaware from exercising jurisdiction over either Gregg or Gregg's stock. The gist of the opinion was that if the state could not constitutionally exercise *in personam* jurisdiction, it could not gain adjudicatory authority simply by changing the label of the jurisdictional base to *quasi in rem.*[23] This holding meant that the Delaware sequestration scheme was violative of due process as applied to the facts in *Gregg.* It was unnecessary, therefore, for the Third Circuit to reach Gregg's contentions concerning procedural due process or a constitutional requirement of a limited appearance rule.[24]

This was the fact situation as it existed prior to the review of *Shaffer* by the United States Supreme Court. The Delaware courts had decided that the due process standards applicable to *in personam* jurisdiction were inapplicable to *quasi in rem* cases and had upheld the sequestration statute as applied in *Shaffer.* The Third Circuit, on the other hand, had concluded that the *in personam* due process standards applied to all jurisdictional exercises, regardless of the label of the theory, and had held the sequestration statute unconstitutional as applied in *Gregg.* Both cases involved sufficient amounts of money that application for Supreme Court review was inevitable.[25] Before it is possible to analyze the holding of the United States Supreme Court in *Shaffer,* however, it is first necessary to examine the theoretical underpinnings of the two conflicting lower court decisions.

II. PRELIMINARY OBSERVATIONS ABOUT THE DELAWARE PROCEDURE

There is certainly nothing unique in the Delaware statutory scheme providing for *quasi in rem* jurisdiction. The theo-

[21] 540 F.2d 142 (3rd Cir. 1976).

[22] 326 U.S. 310 (1945).

[23] 540 F.2d at 154.

[24] *Id.* at 156.

[25] Because of the way the lower court decisions evolved, Supreme Court review of both would be by appeal rather than by writ of certiorari. *See* 28 U.S.C. §§ 1254(2), 1257(1).

retical concept of such jurisdiction has firm roots in American jurisprudence, as every law student who has ever struggled with *Harris v. Balk*[26] can testify. The basic notion is that a state which has control over a thing can adjudicate the rights of parties in that thing. If the rights of the entire world in the thing are adjudicated, the case is *in rem;*[27] if only the rights of certain named parties in the thing are adjudicated, the proceeding is one *quasi in rem.*[28] All of this is simple enough so long as the thing is a tangible object and the rights being asserted arise from the thing itself. Matters become considerably more complex, however, when *quasi in rem* jurisdiction is applied to intangibles which by definition lack a physical existence and hence cannot be said to be more clearly located in one place than in another. Further complications arise when the claim being asserted does not relate to the property which has been attached for jurisdictional purposes.[29] In the discussion which follows no distinction will be made between tangibles and intangibles. It will, however, be necessary to distinguish between claims arising from the thing and claims unrelated to the thing.[30]

A. *The Situs Rule*

If there is anything unique about the Delaware statutory scheme at issue in *Shaffer* and *Gregg,* it is the rule that stock in a Delaware corporation is always deemed to have its situs for sequestration purposes in Delaware. Such a rule is contrary to the basic Uniform Commercial Code provision which requires physical presence of the stock for attachment.[31] Had

[26] 198 U.S. 215 (1905).

[27] RESTATEMENT OF JUDGMENTS § 2 (1942).

[28] *Id.* § 3.

[29] The difficult case of attachment of an intangible to satisfy a claim unrelated to that intangible is that of the casebook favorite, Harris v. Balk, 198 U.S. 215 (1905). Harris owed Balk $180. Balk owed Epstein $300. Harris and Balk were domiciled in North Carolina; Epstein was domiciled in Maryland. While Harris was temporarily in Maryland, Epstein garnished the debt which Harris owed to Balk. Harris paid the money to Epstein. Upon his return to North Carolina, Harris was sued for the debt by Balk. Harris defended, noting payment to Epstein in Maryland pursuant to Maryland judgment. This defense was upheld by the United States Supreme Court.

[30] Since all *in rem* actions arise from the thing by definition, the portion of the discussion which concludes that *quasi in rem* actions arising from the thing are usually constitutionally permissible will also be applicable to *in rem* actions.

[31] U.C.C. § 8-317(1) (1972 version).

Delaware followed the U.C.C. on that point, there would have been no sequestration in either case since the stock in both *Shaffer* and *Gregg* was physically located outside Delaware.

Yet, although the United States Supreme Court in reviewing either *Shaffer* or *Gregg* could have seized upon the Delaware situs rule as a means of escaping the difficult issues of jurisdictional theory, the Court refused to decide *Shaffer* on this basis.[32] That the Court declined to take the easier route seems to have been inevitable since the Court had previously upheld the situs provision of the Delaware statute in *Ownbey v. Morgan.*[33] Even the Third Circuit in its decision in *Gregg* took the position that there was nothing invalid in the provision fixing the situs of stock in Delaware for sequestration purposes.[34] In addition, the Supreme Court allowed to stand and cited with approval the brilliant opinion of the California Supreme Court in *Atkinson v. Superior Court,*[35] in which *quasi in rem* jurisdiction was upheld even though exercised over an intangible which clearly had its situs outside the physical boundaries of California.

B. *The Lack of a Limited Appearance Rule*

Some states have a limited appearance rule which makes it possible for the defendant in a *quasi in rem* action to appear and defend the case on the merits without submitting himself to the *in personam* jurisdiction of the forum.[36] Should the plaintiff prevail in such a case his recovery is limited to the property involved. Should he later proceed again against the defendant on the same claim (assuming that the property involved in the first action was insufficient to satisfy the total claim), the decision for him in the first action would be of no benefit for either *res judicata* or collateral estoppel purposes.[37] If the defendant prevails in the first action, he is protected only in regard to the property involved in the first action. Thus, in

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[32] 45 U.S.L.W. at 4856 n.38.

[33] 256 U.S. 94 (1920).

[34] 540 F.2d at 147.

[35] 316 P.2d 960 (Cal. 1957).

[36] For a discussion of limited appearances, *see* Note, *The "Right" to Defend Federal Quasi in Rem Actions Without Submitting to the Personal Jurisdiction of the Court,* 48 IOWA L. REV. 441 (1963).

[37] *Id.* at 449.

states allowing a limited appearance, the preclusive effects of a judgment in the *quasi in rem* action are quite limited.

No such appearance was available to the defendants in either *Shaffer* or *Gregg,* however, since Delaware does not allow a limited appearance.[38] The district court held in *Gregg* that the federal court was bound to follow the Delaware state rule on the availability of a limited appearance as to those issues in the case involving state law.[39] The district court further concluded that, although it was not required to do so, it would also follow the state limited appearance rule in regard to those issues in the case which involved federal law.[40] Gregg faced a difficult decision as a result of the federal district court's holding on the limited appearance issue: If he appeared to contest the merits of U.S.I.'s claim, he would be submitting to *in personam* jurisdiction whereby any judgment rendered against him could far exceed the value of the stock attached;[41] if, on the other hand, Gregg did not appear to contest the merits of the claim, a default would be entered against him and the stock would be lost.[42] Confronted with a no-win situation Gregg chose the lesser of two evils: He refused to answer and a default judgment was entered against him.[43] A similar dilemma faced the directors whose stock was attached in *Shaffer* since the potential liability in that suit far exceeded the value of the stock attached. Like Gregg, the directors in *Shaffer* could defend their claim to the stock and thereby subject themselves to excess liability or they could refuse to defend the stock and it would be lost pursuant to a default judgment. In both cases it would be fair to say that the practical options open to the defendants were extremely limited.

That Gregg chose to default rather than face a full *in personam* trial on the merits in Delaware is not surprising. Both he and the claim involved in the case were so unconnected with Delaware that it is difficult to conceive of a more inappro-

[38] Sands v. Lefcourt Realty Corp., 117 A.2d 355 (Del. 1965).

[39] 58 F.R.D. at 476.

[40] *Id.* at 477.

[41] The total claim originally stated by U.S.I. against Gregg was for $20,000,000. 540 F.2d at 145.

[42] The stock involved had been valued by the Florida bank which accepted it as collateral at $2,066,333.62. *Id.*

[43] 58 F.R.D. at 481.

priate place for the trial of the action. Given the facts in the case it should be clear (and indeed no one seems ever to have questioned this conclusion) that the state of Delaware could not constitutionally have exercised *in personam* jurisdiction over Gregg. The question which then must be faced is whether that state can attempt to coerce an *in personam* appearance by the seizure of valuable assets of such an unconnected defendant. That coercion of such an appearance by the defendant is the purpose of the Delaware sequestration scheme is extremely clear from the statute itself.[44]

There will be no attempt in this article to see if the dilemma faced by Gregg could have been avoided by a holding that a limited appearance rule was constitutionally required. Certainly nothing in the United States Supreme Court decision in *Shaffer* even hints at such a conclusion. The requirement of such a rule was one of the arguments advanced by Gregg in the Third Circuit, but it was not ruled on by that court. Similar arguments were rejected by the federal district court in *Gregg*[45] and by the Delaware Supreme Court in *Shaffer*[46] and in *Sands v. Lefcourt Realty Corp.*[47] All of the decisions rejecting that argument have used as their basis the early United States Supreme Court case of *York v. Texas,*[48] which held that there was no constitutional right to make a special appearance in an *in personam* case even in light of an especially deceptive Texas statutory scheme.

There is, however, some doubt as to whether *York* would be followed any longer,[49] and certainly portions of its reasoning have since been rejected.[50] It might further be argued that even if *York* is still good law, its rationale does not justify the denial of a limited appearance in *quasi in rem* cases: The defendant who has no special appearance opportunity in an *in personam* case still has the possibility of collateral attack when the judg-

[44] DEL. CODE tit. 10, § 366(a) (1974), reprinted *supra* note 3.

[45] 58 F.R.D. at 481.

[46] 361 A.2d at 236.

[47] 117 A.2d 365 (Del. 1955).

[48] 137 U.S. 15 (1890).

[49] Folk and Moyer, *supra* note 2, at 789 *et seq.*

[50] Riverside and Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915), rejects the notion that it is only the execution of a judgment, not its rendering, which may be violative of due process.

ment is sought to be enforced, and he will prevail if his contention of lack of jurisdiction is correct, provided that the issue of jurisdiction was not litigated in the first proceeding; the defendant who is precluded from a limited appearance where jurisdiction is on a *quasi in rem* basis, however, will suffer the loss of the attached property and lacks any possibility of collateral attack. Although a holding constitutionally requiring a limited appearance would have been another means by which the Supreme Court could have avoided the more difficult issues in *Shaffer,* the Court chose not to so hold.[51] The Supreme Court was probably correct in refusing to read such a limited appearance option into the requirement of due process since limited appearance rules are much criticized as wasteful of judicial resources[52] and appear to exist in only a minority of states today.[53]

With this background information, it is evident that the Supreme Court was left in reviewing either *Shaffer* or *Gregg* with only the most difficult issue of the cases before it. The Court was unwilling to strike down the situs rule, and the Court could not require a limited appearance without being on unsound policy grounds. The Court, therefore, had no choice but to confront the basic philosophical differences between the two cases; in particular, the Court was forced to address the fundamental problem of the extent to which modern notions of due process interact with traditional theories of jurisdiction. Before the basic question of whether modern notions of due process add to or restrict the traditional bases of jurisdiction can be understood and the Supreme Court decision in *Shaffer* fully appreciated, some background discussion of early theories of jurisdiction, both *quasi in rem* and *in personam,* is necessary.

III. TERRITORIAL ASPECTS OF JURISDICTION

In great measure, historical approaches to judicial jurisdiction were firmly based on the physical existence of the forum state. The basic concept was that the state had an inherent ability to exercise judicial control over persons, things, and events which were located within the boundaries of the state.

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[51] 45 U.S.L.W. 4849 (1977).

[52] Folk and Moyer, *supra* note 2, at 794.

[53] Note, *supra* note 36.

This idea of physical control influenced not only the development of *in rem* jurisdiction and, in turn, *quasi in rem* jurisdiction, but was also crucial in early exercises of *in personam* jurisdiction.

Even as late as 100 years ago, there were major cases in the United States Supreme Court basing the *in personam* jurisdictional powers of the state on the physical presence of individuals. As of that time, *in personam* jurisdiction existed only if the individual defendant had been personally served while within the confines of the state or had voluntarily appeared in the action against him. The holding of the United States Supreme Court in *Pennoyer v. Neff*[54] was that an attempt by the state to exercise jurisdiction in the absence of such connections violated the due process clause of the fourteenth amendment.[55]

It is probable that the notion of the existence of *in personam* power based on personal service within the state can be traced to the common law writ of *capias ad respondendum* by which a civil defendant could be jailed pending trial.[56] Since the expansion of the early theories of *in personam* jurisdiction into their modern forms is familiar to all lawyers, no attempt will be made to detail that expansion; for present purposes it is sufficient to say that until the beginning of this century, jurisdiction *in personam* was available only in restricted circumstances. It might also be noted that although the restrictions were removed by a gradual evolutionary process, it is only in the 30 years since *International Shoe Co. v. Washington*[57] that a really drastic break has been made with the philosophical territorialist underpinnings of *Pennoyer.* It is indeed ironical that the final demise of these territorialist underpinnings came exactly 100 years after the *Pennoyer* decision as the ultimate result of the Supreme Court decision in *Shaffer.*

Given the fact that *in personam* jurisdiction was until recently so limited, it is hardly mysterious that other jurisdictional theories were developed in an effort to supplement it. The concept of adjudicating the rights of the world in things

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[54] 95 U.S. 714 (1877).

[55] U.S. CONST. amend. XIV.

[56] The history of the *capias* is discussed at length in Fox, *Process of Imprisonment at Common Law,* 39 L.Q. REV. 46 (1923).

[57] 326 U.S. 310 (1945).

within the physical control of the forum was well known from common law *in rem* jurisdiction.[58] And if a court could adjudicate such rights in a thing, why should it not have the less objectionable ability to adjudicate the rights of a more limited number of persons in that thing? Such adjudication is, of course, a *quasi in rem* proceeding.

An adjudication of the rights of the named parties in the thing could be done by a court in either of two settings. The first would involve the determination of the rights of the parties in the thing on a claim arising from the thing. Such an action would be exemplified in a suit to remove a cloud on a title. As to a claim arising from the thing, the action is truly *quasi in rem* in the sense that it does more closely resemble an *in rem* proceeding than an *in personam* proceeding. The second type of adjudication would determine the rights of the named parties in the thing on a claim not arising from the thing. This second type of adjudication is exemplified by *Harris v. Balk,* in which the right asserted by Epstein to the $180 owed by Harris to Balk did not arise from that $180 but rather from a separate debt of some $300 which Balk owed Epstein.[59] As to a claim not arising from the thing, the action has also been traditionally labeled *quasi in rem.* The label is misleading, however, since such an action is actually *quasi in personam* because it resembles more closely an *in personam* action than an *in rem* action.

Both sorts of *quasi in rem* adjudications were allowed because of the state's interest in things which were physically located within its boundaries. As to claims arising from the thing, such jurisdiction is justifiable due to the interest which the state has in deciding conflicting claims to the thing.[60] As

[58] Jurisdiction *in rem* had its roots in the admiralty jurisdiction of the English courts. For a discussion of such jurisdiction, see Tyler v. Judges of the Court of Registration, 55 N.E. 812 (Mass. 1900).

[59] 198 U.S. 215 (1905).

[60] As to such claims, many states now assert *in personam* jurisdiction over persons with conflicting interests in the thing. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03 (1962) provides that:

> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's
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> . . . .

to claims not arising from the thing, the state arguably has no such interest since the adjudication regarding the thing is simply an adjunct to the decision regarding the underlying, unrelated controversy between the named parties. The only similarity in the two instances is that in both cases the state has physical control over the thing.

In brief summary, then, the concept known as *quasi in rem* jurisdiction gave the state adjudicatory authority over a group of cases which could not have been adjudicated *in personam* due to the restrictive territorialist notions associated with that doctrine. The two classes of cases involved real *quasi in rem* fact patterns and *quasi in personam* fact patterns depending upon the source of the rights asserted. The second class of cases gave what was in reality an expanded *in personam* power at a time when, without such fictions, expansion was impossible.

Although legal scholars are well-known for wanting to dwell on historical trivialities, this discussion about the territorialist aspects of early judicial jurisdiction is not without purpose. The major point is that a portion of the jurisdiction which is now called *quasi in rem* developed to provide a much needed expansion of *in personam* jurisdiction during a time period when territorialist fictions were necessary to justify expansions of jurisdiction.[61] The real question involved in *Shaffer* and *Gregg,* therefore, was whether such fictions could survive after the need for them seemed to have faded away. Keeping in mind that *quasi in rem* jurisdiction has been used to adjudicate claims unrelated to the thing as well as claims arising from the thing, can that jurisdictional theory still be used consistently with modern due process notions of *in personam* jurisdiction? This is the subject to which the Supreme Court addressed itself in *Shaffer.* Before it is possible to consider directly the Supreme Court treatment of that case, however, it is necessary to

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(5) having an interest in, using, or possessing real property in this state . . . .

[61] The use of a fiction to accomplish such expansion is neither unusual nor surprising. For a discussion of such fictions, see Olberding v. Illinois Cent. R.R., 346 U.S. 338, 340-41 (1953). *See also* Milliken v. Meyer, 311 U.S. 457 (1940).

Such devices were used in the actual expansion of *in personam* jurisdiction over domiciliaries of the forum and included the implied consent ideas in cases involving motorists. Hess v. Pawloski, 275 U.S. 352 (1927).

examine the applicable modern theories of jurisdiction and due process.

IV. MODERN NOTIONS OF JURISDICTION *In Personam*

The traditional notions of *in personam* jurisdiction were in great part derived from those legislative jurisdictional theories which once controlled choice of law thinking in the United States.[62] In both the area of conflicts (legislative jurisdiction) and that of judicial jurisdiction, there has been a turning away from basic territorialist foundations. In the conflicts area, the vested rights philosophy is increasingly rejected as states strive to apply their own law to persons outside their boundaries and to events occurring physically outside their boundaries.[63] This trend is undoubtedly motivated by the recognition that states do have legitimate interests in persons and events outside their own borders.

What is true in regard to legislative jurisdiction has also proved to be true for judicial jurisdiction. Since the time of *Pennoyer,* states have attempted to broaden their jurisdictional bases in responses to fundamental changes in American society. With increased mobility and commerce, it is no longer possible for states simply to exercise *in personam* jurisdiction on the rigid territorialist bases of *Pennoyer.* The outer dimensions of this expanding body of law have been, and will continue to be, set by United States Supreme Court interpretations of due process. Without attempting to detail this trend of expansion, it is sufficient to note that instead of relying on fiction, the Court has allowed expanded *in personam* jurisdiction on the basis of examinations of the underlying policies relevant to particular fact patterns.[64]

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[62] That legislative jurisdiction theories once controlled choice of law thinking in the United States is evidenced by the RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

[63] For a discussion of the various "interest analysis" theories, see Leathers, *Dimensions of the Constitutional Obligation to Provide a Forum,* 62 KY. L.J. 1 (1973).

[64] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

It is not necessary to detail the dimensions of those tests which have emerged since it is clear that the state of Delaware could not constitutionally have exercised *in personam* jurisdiction over Gregg.

Similar constitutional objections to the exercise of *in personam* jurisdiction over the defendant directors in *Shaffer* were made, and it is clear from the Supreme Court's

Yet, the constitutional allowance of expanded *in personam* jurisdiction is not self-implementing. For a state to have long arm jurisdiction over any case it must have a long arm statute authorizing such jurisdiction; moreover, that statute, as applied to the fact pattern at hand, must comply with the substantive due process dimensions set by the Supreme Court. However, to say that a state could constitutionally exercise *in personam* jurisdiction through these means is not to say that it *must* exercise such jurisdiction.[65] Certainly a state could still limit its personal jurisdictional powers to the traditional bases outlined in *Pennoyer.* Yet the trend has been to expand these bases. At issue in both *Gregg* and *Shaffer* is how that trend in the area of personal jurisdiction affects *quasi in rem* jurisdiction. Strangely enough, with preliminary matters out of the way the answer to the question is not as difficult as it might at first appear. Indeed, the answer is so clear-cut that there was no dissent in the United States Supreme Court on the issue of the application of modern constitutional due process standards to *quasi in rem* jurisdiction.[66]

V. THE UNITED STATES SUPREME COURT DECISION: *Shaffer v. Heitner*

As was noted in the discussion of the Delaware Supreme Court's decision in *Shaffer,* the directors who were defendants in that action were placed in a no-win situation: The only way they could protect their stock interest was to enter a general appearance in Delaware, which would subject them to full *in personam* jurisdiction; if, on the other hand, they chose not to make such an appearance, a default judgment would be entered against them and their stock would be lost. The defen-

holding in that case that those objections were deemed correct by the majority. This appears to be a departure from conventional wisdom. For the moment, it is sufficient to assume that Delaware could not constitutionally exercise *in personam* jurisdiction over the defendant directors. That premise will be examined at length when the dissenting portion of the *Shaffer* opinion is discussed. *See* text accompanying notes 80-92 *infra;* Shaffer v. Heitner, 45 U.S.L.W. 4849, 4858 (1977) (Brennan, J., concurring in part and dissenting in part).

[65] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[66] 45 U.S.L.W. 4849 (1977). The opinion of Mr. Justice Brennan concurs on the theoretical aspects of applying minimum contacts requirements to *quasi in rem* jurisdiction; his dissent concerns the application of the theory to the fact pattern at hand.

dants sought to escape the dilemma by filing a motion to quash service of process and to vacate the sequestration order of the Delaware courts. This motion was denied by the Court of Chancery of Delaware in a decision which was upheld by the Delaware Supreme Court.[67]

Despite the fact that the denial of these motions was not a final decision on the merits of the underlying controversy, the United States Supreme Court took jurisdiction of the appeal due to the fact that the state decisions were final on the crucial federal issue.[68] The Court reversed the decision of the Delaware courts, finding that since the state could not constitutionally exercise *in personam* jurisdiction over the defendant directors, the state was constitutionally barred from exercising *quasi in rem* jurisdiction over them as well. The holding very clearly indicates that the relevant test for determining the constitutionality of exercises of *quasi in rem* jurisdiction will be found in the due process standards of *in personam* cases beginning with *International Shoe Co. v. Washington.*[69] The rationale of the Court's decision was that modern developments in the area of *in personam* jurisdiction were relevant to continued exercises of *quasi in rem* jurisdiction, at least where the claims being adjudicated did not arise from the thing which was involved *(quasi in personam* jurisdiction).

A. *Applying* In Personam *Jurisdictional Standards to* Quasi in Rem *Proceedings*

The careful distinctions which had once existed between *in personam* jurisdiction and *quasi in rem* jurisdiction had blurred to a considerable extent in the years preceding *Shaffer.* As was pointed out by the Third Circuit in *Gregg,* the United States Supreme Court had previously held in *Mullane v. Central Hanover Bank* that for purposes of notice of a pending action, no distinction was to be drawn between cases based on different types of jurisdiction.[70] As a result of that decision, the type of notice previously used in the *in personam* jurisdictional cases is also required in both *quasi in rem* and *in rem* cases.

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[67] Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976).
[68] Shaffer v. Heitner, 45 U.S.L.W. 4849 (1977).
[69] 326 U.S. 310 (1945).
[70] 339 U.S. 306 (1950).

The Supreme Court recognized in *Mullane* that the presumption that a property owner was always in possession of his property was a fiction which could not survive modern standards of basic fairness,[71] particularly in light of one peculiar fact in that case.[72] The Third Circuit in *Gregg* therefore concluded that this requirement of identical notice regardless of the jurisdictional basis meant that jurisdiction should not be exercised *quasi in rem* if jurisdiction could not be exercised *in personam*.[73] The Supreme Court in *Shaffer* also seized upon the theory of *Mullane* to illustrate the blurred distinctions between the various types of jurisdiction and stated:

> The law of state court jurisdiction no longer stands securely on the foundation established in *Pennoyer*. We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*.[74]

Although the holding in *Mullane* was a significant factor in the conclusion reached by the Supreme Court in *Shaffer*,[75] *Mullane* did not in itself require that the Court go as far as it did in *Shaffer*. When taken alone, the fact that the notice standards are the same in both *in personam* and *in rem* actions is a rather slender thread upon which to base the *Shaffer* holding. Although the distinction between theories may have become blurred and meaningless for purposes of notice, it would be extending that development too far to use it as the sole basis on which to overrule settled jurisdictional law. Thus *Mullane* merely furnishes an underlying philosophy for the result in *Shaffer*.

A better case upon which to base the abolition of any distinction between *quasi in rem* and *in personam* jurisdiction is

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[71] *Id.* at 316.

[72] *Id.* The peculiar fact was that the adversary of the trust beneficiaries was the trustee itself. Hence, seizure or attachment, which would normally alert the party in custody of the thing, would serve no purpose since the party in custody was the adversary of the party seeking protection.

[73] 540 F.2d at 156.

[74] 45 U.S.L.W. at 4855.

It might be well to note at this time that the Court in its decision in *Shaffer* discussed at all points the concepts of both *quasi in rem* and *in rem* under the single heading of *in rem*.

[75] *Id.*

that of the California Supreme Court in *Atkinson v. Superior Court.*[76] In that decision, written by Justice Traynor, the California court was faced with a situation in which California was unable, due to shortcomings in its then-existing long arm statute, to exercise *in personam* jurisdiction over a suit by members of a union to stop payment of portions of their wages to a trust fund being administered by a New York trustee.[77] This was an unfortunate situation since the members of the union were domiciled in California and the payments were being made by their employers from California to the New York trustee pursuant to the directions of their union. California law indicated that the trustee was necessary to the adjudication of the controversy, but long arm jurisdiction over the trustee was statutorily unavailable.[78] Further, under traditional law the situs of the trust would have been New York.[79] Despite those obstacles, the California Supreme Court held that *quasi in rem* jurisdiction could be exercised by California so as to adjudicate the rights of all parties, including the trustee, in the trust. In so doing, the California court held that since the trust had minimum contacts with the forum, such *quasi in rem* jurisdiction was available and permissible. *Atkinson* indicates, therefore, that the *in personam* jurisdictional standards do apply to actions *quasi in rem* and, despite the lack of United States Supreme Court review of the California decision, *Atkinson* furnishes some support for the holdings in both *Shaffer* and *Gregg.*

Also to be noted about the *Atkinson* decision is the fact that an exercise of *in personam* jurisdiction over the trustee would have been constitutionally permissible had California not lacked an adequate long arm statute. This is clearly implicit in the holding of the California Supreme Court regarding minimum contacts with California. This means that in a situation in which *in personam* jurisdiction would have been consti-

[76] 316 P.2d 960 (Cal. 1959). Yet, despite the strength afforded by *Atkinson,* the decision received only passing notice from the Supreme Court in *Shaffer.* 45 U.S.L.W. at 4854.

[77] 316 P.2d at 965. Since that decision, California has adopted a long arm statute which extends to the full range of due process. CAL. CIV. PROC. CODE § 410.10 (West 1973).

[78] 316 P.2d at 966.

[79] *Id.* at 963. The Court pointed out that intangibles actually had no situs.

tutionally permitted had the statutory requirements been met, the state of California chose instead to exercise *quasi in rem* jurisdiction. It is this aspect of *Atkinson* which is crucial in the formulation of a new theory of *quasi in rem* jurisdiction compatible with modern developments in the area of substantive due process. It is to be hoped that such a new theory will be the direct outgrowth of the decision of the Supreme Court in *Shaffer.*

B. *Delaware Directors and Judicial Jurisdiction*

In light of the foregoing discussion, it is necessary at this point to devote attention to the portion of the Supreme Court's decision in *Shaffer* which appears to conclude that the state of Delaware could not constitutionally exercise jurisdiction in any form over the directors of Greyhound.[80] In all fairness, it would not be possible to characterize the majority opinion in this area as better than muddled. Thus, it is possible to read *Shaffer* as indicative of either of two holdings. At the outset, it is clear that in *Shaffer* the Supreme Court did strike down the attempt by the state to exert jurisdiction, and it is equally clear that the result hinged somehow on the *in personam* notions of *International Shoe Co. v. Washington.* Identifying the rationale for this result is more difficult. The holding is only possible on two bases. The first is that the Court felt Delaware could not constitutionally exercise *in personam* jurisdiction over corporate directors in a stockholders' derivative action since the state lacked minimum contacts with the defendants. This is the reading given the majority opinion both by Mr. Justice Brennan and by this writer. The second possible holding is that the Court felt that there is a constitutional preference for *in personam* jurisdiction; therefore if Delaware had the permissible option of using *in personam* jurisdiction, it was constitutionally required to do so over other jurisdictional forms.[81]

The Court's apparent recognition that it would have been possible for Delaware to enact a long arm statute which would

[80] This has been identified as the holding of the Court based on this writer's reading of the opinion, and was arrived at, in great part, from observing the dissenting reaction of Mr. Justice Brennan to the result of the facts peculiar to *Shaffer.* 45 U.S.L.W. 4849, 4858 (1977) (Brennan, J., concurring in part and dissenting in part).

[81] Folk and Moyer, *supra* note 2, at 798.

have reached these defendants is supportive of the second possible holding (preference for *in personam* jurisdiction). For instance, the Court noted at one point that "[i]f Delaware perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as Heitner suggests, we would expect it to have enacted a statute more clearly designed to protect that interest."[82] Later the Court observed that "Delaware, unlike some states, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State."[83] The Court seems to have further acknowledged the interest of Delaware in securing jurisdiction over the corporate defendants when it observed that:

> The interest appellee has identified may support the application of Delaware law to resolve any controversy over appellant's actions in their capacities as officers and directors. But we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.[84]

Of this interaction between due process controls over choice of law (legislative jurisdiction) and due process controls over jurisdiction (judicial jurisdiction), more will be said later.[85] For the present it is sufficient to observe that the implication of the Court that the state could have applied a long arm statute to this fact pattern seems to refute the portion of the possible holding that the defendants lacked minimum contacts with the state. This, in turn, would mean that the striking of Delaware's exercise of jurisdiction was based upon a constitutional preference for *in personam* jurisdiction.

Despite these facts, such a preference should not be read into *Shaffer*. Certainly there is nothing specific in *Shaffer* to indicate this preference and such a reading ought not be given to a decision which is easily capable of explanation on the more familiar grounds of lack of minimum contacts. It would also be a mistake to choose such a dubious construction in light of the fact that one Court member, Mr. Justice Brennan, did not at all identify such a possibility. Lastly, it should be noted that

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[82] 45 U.S.L.W. at 4857.

[83] *Id.*

[84] *Id.*

[85] *See* text accompanying notes 132-43 *infra*.

all the language implying such a preference comes in a portion of the opinion in which the majority is making light of the Delaware interest in the litigation. The majority itself noted that "Delaware law bases jurisdiction not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State."[86]

It would seem correct, therefore, to conclude that the Court felt that the defendants lacked minimum contacts with Delaware and hence that the State could not constitutionally exercise jurisdiction over them in any form. Yet, this particular conclusion, as applied to the facts of *Shaffer,* is open to considerable question. In his dissenting opinion, Mr. Justice Brennan observed, "I am convinced that as a general rule a state forum has jurisdiction to adjudicate a shareholder derivative action centering on the conduct and policies of the directors and officers of a corporation chartered by that State."[87] This conclusion seems especially defensible since in any such action the ultimate recovery will run to the corporation rather than directly to the benefit of the plaintiff shareholders. The wrong complained of in such a suit is a wrong to the corporation and if the corporation has been harmed, it would seem to be within the control of the chartering state to provide a forum to redress such a harm. Yet, the majority in *Shaffer* observed, drawing upon language from *Hanson v. Denckla,*[88] that the directors in this case had not "purposefully availed themselves of the privilege of conducting activities within the forum state."[89] The conclusion of the Court was that "it strains reason . . . to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to subject himself to Delaware's . . . jurisdiction on any cause of action."[90] While this conclusion would certainly be true in regard to an ordinary stockholder, such as the defendant in *Gregg,* it does not seem to be necessarily true when the stockholder is also a director of the corporation. In fact, as is suggested by Mr. Justice Brennan, a corporate director is in a position of trust to the corpora-

[86] 45 U.S.L.W. at 4857.
[87] *Id.* at 4859 (Brennan, J., concurring in part and dissenting in part).
[88] 357 U.S. 235 (1958).
[89] 45 U.S.L.W. at 4857.
[90] *Id.*

tion and any breaches of that trust should be redressed in the chartering state.[91] This point would seem to be implicit in the majority's recognition of the fact that it is Delaware law which would govern the obligation of the directors to the corporation if they were subjected to the state's jurisdiction.[92] Thus, the Court was incorrect in its conclusion that the directors lacked minimum contacts with Delaware in regard to the suit at hand.

C. *Some Conclusory Remarks*

It is to be concluded from the preceeding discussion that under no circumstances should the results in both *Shaffer* and *Gregg* have been the same. *Gregg* represents a classic situation in which any exercise of *in personam* jurisdiction would have been constitutionally impermissible. In such a case, therefore, any attempt to exercise *quasi in rem* jurisdiction would be equally objectionable on constitutional grounds. On the other hand, *Shaffer* appears to be a case in which *in personam* jurisdiction should have been constitutionally available, yet one in which such an exercise was impossible because of the lack of a Delaware long arm statute designed to reach such facts. In that circumstance, it would appear that the Delaware courts were properly using their *quasi in rem* sequestration scheme to secure *in personam* jurisdiction in a circumstance where such jurisdiction was constitutionally permissible but statutorily unavailable.

The theoretical underpinnings of both *Shaffer* and *Gregg* are the same. In this respect, the Supreme Court decision was correct. It is for that reason that Mr. Justice Brennan did not dissent from the portion of the majority opinion which applied the test of *International Shoe* to *quasi in rem* jurisdiction. Moreover, what has probably evolved from *Shaffer* and *Gregg* is the basis for a new theory of *quasi in rem* jurisdiction which recognizes the two types of *quasi in rem* cases (claims arising from the thing and claims not arising from the thing) as being analytically different for constitutional purposes. The discus-

[91] *Id.* at 4859 (Brennan, J., concurring in part and dissenting in part).

[92] The constitutional permissibility of *in personam* jurisdiction over corporate directors in such actions is clearly conceded in the Folk and Moyer argument for a preference for *in personam* jurisdiction. Folk and Moyer, *supra* note 2.

sion which follows examines that new theory of *quasi in rem* jurisdiction and attempts to show how such a theory bears on existing case law.

VI. TOWARD A NEW THEORY OF *Quasi In Rem* JURISDICTION

The Supreme Court decision in *Shaffer* hints at a new theory of *quasi in rem* jurisdiction, but does not expand on the precise dimensions of such a theory. Needed at this point, therefore, is a comprehensive re-thinking of the basic assumptions of *Harris v. Balk*[93] in light of jurisdictional changes made since that case was decided. The Supreme Court held in *Harris* that there was no constitutional problem involved in the garnishment in Maryland by Epstein of Harris' debt to Balk, provided that Balk could have sued Harris in Maryland on the debt. If this test were still relevant to a determination of the constitutionality of usage of *quasi in rem* jurisdiction, neither *Shaffer* nor *Gregg* would have been questionable exercises of jurisdiction. Surely the directors in *Shaffer* could have sued the corporation in Delaware on any claims which they had against the corporation. In both instances citizens of one state would be in Delaware asserting claims against a Delaware corporation, and the existence of *in personam* jurisdiction over the corporations would be, in both cases, unquestionable. But this fact alone does not necessarily support the conclusion that *quasi in rem* jurisdiction should still be available. Indeed, it is precisely that conclusion which is stricken by the holding in *Shaffer*.

In light of decisions like *Mullane*[94] and *Atkinson*,[95] it seems desirable to abolish, for purposes of federal due process considerations, all distinctions between *quasi in rem* jurisdiction and *in personam* jurisdiction. (It might be added that no special consideration should be given to the relatively rare category of jurisdiction now labeled *in rem.)* The effect of this would be a holding that the test of *International Shoe* and its progeny is applicable to all exercises of jurisdiction, however they may be labeled. This is the holding in *Shaffer*. The necessity of the

[93] 198 U.S. 215 (1908).
[94] Mullane v. Central Hanover Bank, 339 U.S. 306 (1950).
[95] Atkinson v. Superior Court, 316 P.2d 960 (Cal. 1957).

abolition of all distinctions between *quasi in rem* and *in personam* jurisdiction would seem to be clear from trends already observed. This necessity is exemplified by the very unfair choice with which Gregg was faced: loss of his stock or exposure to expansive liability in an inconvenient forum. As has been noted,[96] the choice facing the directors in *Shaffer* did not seem that unfair; however, it was so regarded by the Supreme Court.

To say that the distinction between *quasi in rem* jurisdiction and *in personam* jurisdiction is abolished for purposes of substantive due process is not, however, to say that *quasi in rem* jurisdiction itself is abolished. Remembering that the *in personam* jurisdictional dimensions of *International Shoe* are merely permissive for the states and not self-implementing, a state may still choose not to have long arm statutes which go to the outer limits of due process in establishing *in personam* jurisdiction. This will mean that there may be fact patterns in which the state could constitutionally exercise *in personam* jurisdiction but has not chosen to do so. In such fact patterns, the state should be left with the option of providing for the exercise of *quasi in rem* jurisdiction. Under these circumstances, the state would merely be using the procedure as it was used historically—as an adjunct to *in personam* jurisdiction when the claims being adjudicated do not arise from the thing itself. The important concept to be remembered about such an exercise is that it would not in any way transgress the basic ideas of fairness articulated in *International Shoe,* since the state would merely be utilizing a more limited form of jurisdiction in a fact pattern in which it could have used the broader form of *in personam* jurisdiction. Nor is there any objection to a state's lack of provision for a limited appearance in such a case. The fact that an appearance exposes the defendant to expanded liability is meaningless since such exposure is constitutionally permissible in the realm of *in personam* jurisdiction if the state chooses to enact an appropriate long arm statute. What is suggested, therefore, is that, in light of developments in the area, *quasi in rem* jurisdiction should now be perceived as merely a form of long arm jurisdiction. Moreover, it is an option which should be available to the state when it falls

[96] *See* text accompanying note 87 *supra.*

within the constitutional boundaries set in the cases following *International Shoe.*

Traynor's use in *Atkinson*[97] of *quasi in rem* jurisdiction based on the *in personam* minimum contacts test[98] exemplifies the basic philosophy that *quasi in rem* jurisdiction is allowable when *in personam* is constitutionally permissible yet statutorily impossible. Yet, it would also seem that *quasi in rem* should continue to be available as an option even in cases where *in personam* jurisdiction is both constitutionally and statutorily permissible. In such cases, the state would seem to be providing and the plaintiff utilizing a procedure designed to provide security for the action by way of prejudgment attachment. Although this view has been judicially rejected elsewhere,[99] the utilization of attachment for security purposes rather than for jurisdictional purposes should activate whatever remains of the procedural due process restraints on prejudgment attachment.[100] This argument was rejected by the Delaware Supreme Court in *Shaffer,* but in that holding the Court was not viewing the jurisdictional exercise in the same manner proposed here (as security through prejudgment attachment). Consequently, the Delaware Supreme Court decision that such protections were inapplicable should not foreclose a utilization of *quasi in rem* as a means of providing security by way of prejudgment attachment. The Supreme Court in reversing that decision in *Shaffer* did not rule on this matter. Yet, it is the viewpoint of this author that: (1) *quasi in rem* can be utilized as either a jurisdictional option or as a security option; and (2) although the application of procedural due process restraints is beyond the scope of the present discussion, such procedural safeguards should attach in cases using the *quasi in rem* form for security purposes.[101]

With the new philosophy that *quasi in rem* jurisdiction exists simply as a procedural option open to the state in cases

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[97] Atkinson v. Superior Court, 316 P.2d 960 (Cal. 1957).

[98] *Id.* at 965.

[99] Lebowitz v. Forbes Leasing and Fin. Co., 456 F.2d 979 (3rd Cir.), *cert. denied,* 409 U.S. 843 (1972).

[100] The *Sniadach* protections were significantly restricted in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

[101] Note, *Quasi in Rem Jurisdiction and Due Process Requirements,* 82 YALE L.J. 1023 (1973).

in which it could constitutionally have exercised *in personam* jurisdiction, a fairly surprising development can be seen in the fact patterns in *Shaffer* and *Gregg*. Since the two cases as decided by the Delaware Supreme Court and the Third Circuit took diametrically opposed views on the issue of the availability of jurisdiction in the cases, it would seem that one of the decisions must be incorrect. Such a conclusion appears to be supported by the reversal of *Shaffer* by the United States Supreme Court. From the holding in *Shaffer,* it is clear that the Supreme Court must uphold the ruling of the Third Circuit in *Gregg*. Clearly, the United States Supreme Court rejected the conclusion of the Delaware Supreme Court that the *in personam* jurisdictional standards had no effect in a *quasi in rem* action.[102] Yet, despite the fact that the Delaware Supreme Court's rationale in *Shaffer* was quite different from the rationale of the Third Circuit in *Gregg,* the *result* on the facts in *Shaffer* in the Delaware Supreme Court was as correct as the result on the facts in *Gregg*. *Gregg,* therefore, is the case which should have been reviewed by the United States Supreme Court, not *Shaffer*.

It must be remembered that *Shaffer* was a stockholders' derivative action against director-stockholders of Greyhound for alleged mismanagement of the corporation and that the action was taking place in a forum which was the state of incorporation of Greyhound. There is no reason why the state of incorporation should not constitutionally be able to exercise *in personam* jurisdiction over the directors. The minimum contact connecting the directors to the forum would be their acceptance of a directorship of a corporation incorporated in the forum. Further contact would come from the fact that the course of conduct complained of was allegedly harmful to that corporation and that any recovery in such a suit would run to the corporation rather than directly to the stockholders involved as parties plaintiff. The interest which the state has in the corporation which it created gives it a sufficient basis to exercise *in personam* jurisdiction over the directors of that corporation. This is the contention, discussed earlier,[103] coming

[102] 45 U.S.L.W. at 4856.

[103] *See* text accompanying note 87 *supra*.

from the section of Mr. Justice Brennan's opinion in which he dissented from the result on the facts in *Shaffer*.[104] It is mentioned again at this point merely to illustrate the workings of the new theory of *quasi in rem* jurisdiction.

Thus, the factual result of the holding of the Delaware Supreme Court in *Shaffer* is consistent with the new philosophy of *quasi in rem* jurisdiction which is urged here. Since Delaware could constitutionally have exercised *in personam* jurisdiction over the directors, there should be no constitutional barrier to the state's allowance of a *quasi in rem* proceeding against the directors. The fact that there may be exposure to excess liability by requiring the directors to come into Delaware to defend their stock is of no consequence since this is merely a liability to which the defendants could have been constitutionally subjected in the first place. On the other hand, it is equally clear that the holding in *Gregg* that the exercise of jurisdiction there was unconstitutional is also correct under this theory. Given the facts in that case, Gregg could not have been subjected to *in personam* jurisdiction by the Delaware courts; neither, therefore, should he have been subjected to *quasi in rem* jurisdiction. Thus, it is the opinion of this author that the Supreme Court could have better established the new basis for *quasi in rem* jurisdiction by affirming *Gregg*, not overruling *Schaffer*.

The philosophy espoused in this article which limits *quasi in rem* jurisdiction to those situations in which *in personam* jurisdiction is constitutionally permissible does not have the drastic effect upon *quasi in rem* jurisdiction which could result from a full-fledged adoption of the rationale of the Third Circuit in *Gregg*. Although the author is in agreement with the result reached by the Third Circuit on the facts in *Gregg*, the impact of the author's jurisdictional theory is not as far-reaching. To understand why it is not as far-reaching requires a recollection that *quasi in rem* cases have traditionally fallen into two distinct classes: those involving claims arising from the thing involved (clearly *quasi in rem* and including fact patterns such as *Atkinson*[105]) and those involving claims unre-

[104] 45 U.S.L.W. at 4858 (Brennan, J., concurring in part and dissenting in part).
[105] 316 P.2d 960 (Cal. 1957).

lated to the thing used as a jurisdictional base (really *quasi in personam* and involving such cases as *Harris.*[106]) The new philosophy relating *quasi in rem* to *in personam* will usually have no effect on the first class of cases. The state will still be able to exercise jurisdiction in cases where the claim arises from the thing simply because the interest in the thing itself is a sufficient contact for the exercise of *in personam* jurisdiction if the state chooses to exercise it. As proof of that fact, witness how most long arm statutes allow the exercise of *in personam* jurisdiction over a person who owns real property in the state so long as the claim involved arises from the ownership of that property.[107] The Supreme Court in *Shaffer* recognized this ability to adjudicate claims arising from the thing when it stated:

> [W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in State would normally indicate that he expected to benefit from the State's protection of his interest . . . .
>
> It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state court jurisdiction must satisfy the *International Shoe* standard.[108]

Thus such exercises of jurisdiction *in personam* as to claims arising from things with sufficient contacts with the state would clearly be constitutional.[109] Since the state would have the ability to act *in personam* in all actions in which the claim arises from the thing, there is no reason under the new theory to prevent adjudication *quasi in rem* if the state chooses to do so. The state would simply be exercising its constitutionally permissible powers in one form rather than in another. Considering the result in *Atkinson,*[110] it might even be added that such ability to adjudicate does not depend in any degree on whether

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[106] 198 U.S. 215 (1905).

[107] UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03 (1962), reprinted *supra* note 60.

[108] 45 U.S.L.W. at 4855.

[109] Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (1938). Note that this holding even pre-dates the expansion of long arm jurisdiction in *International Shoe.*

[110] 316 P.2d 960 (Cal. 1957).

the thing is physically present in the state. If the state has a sufficient interest in the thing, it can adjudicate claims arising from that thing by whatever procedural label it chooses to attach.

Both the approach taken by the Third Circuit and that of the author are therefore identical as they relate to true *quasi in rem* actions. The major restrictive effect of the equation of *quasi in rem* with *in personam,* however, is that the ability of the state to adjudicate the rights of parties in a thing when the claim involved does not arise from the thing will be limited. This means simply that all exercises of *quasi in personam* jurisdiction (as it has previously been labeled in this discussion) will have to meet the standards set by the due process cases coming from *International Shoe.*[111] Given the purposes for which jurisdiction is being used when the claim does not arise from the thing, there is nothing objectionable about such a restriction.

One result of the Supreme Court decision in *Shaffer* is an overruling of the aspects of *Harris v. Balk*[112] which allowed *quasi in personam* jurisdiction. The Court itself observed that "[f]or the type of *quasi in rem* action typified by *Harris v. Balk* and the present case, however, accepting the proposed analysis would result in significant change."[113] Such exercises of jurisdiction are inconsistent with modern notions of due process because "in cases such as *Harris* . . . the only role played by the property is to provide the basis for bringing the defendant into court."[114] Thus, the Court asserted that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible."[115]

The decision to limit *quasi in rem* jurisdiction to situations in which *in personam* jurisdiction is constitutionally available will normally have no effect upon traditional exercises of *in rem* jurisdiction.[116] By definition, such exercises are designed to ad-

[111] International Shoe Co. v. Washington, 326 U.S. 310 (1945).
[112] 198 U.S. 215 (1905).
[113] 45 U.S.L.W. at 4855.
[114] *Id.*
[115] *Id.*
[116] *Id.*

judicate claims relating directly to the thing involved. There is no reason why a state should not have the ability to adjudicate the rights of non-parties as to claims arising from the thing. What this means is that the state could bind such absent parties *in personam* as regards claims to the property involved and so it may bind their interest *in rem*. The label used does not matter (which would seem to make the entire area now consistent with the philosophy of *Mullane*);[117] rather it is the effect that is to be considered. It is the interests which the state has in the property and in the claims arising from the property which give rise to the ability to adjudicate.

VII. THE EFFECT OF JURISDICTIONAL CHANGES ON *Seider v. Roth*

One of the more controversial uses of *quasi in rem* jurisdiction in recent years has been that pioneered by New York in *Seider v. Roth*.[118] The fact pattern in *Seider* should indicate that the procedure employed in that case will present some difficulties if the new theory of *quasi in rem* jurisdiction (limiting *quasi in rem* jurisdiction to situations in which *in personam* jurisdiction would be constitutionally available) is expanded to the utmost.

In *Seider* a New York plaintiff wanted to sue a Canadian defendant for damages arising from an automobile accident which occurred in Vermont.[119] It should be clear that in this fact pattern the New York courts could not constitutionally have exercised *in personam* jurisdiction over the defendant unless he either had chosen to appear voluntarily or had been served with process while within the state. Instead of attempting to obtain *in personam* jurisdiction, however, the New York plaintiff proceeded against the defendant in New York by means of *quasi in rem* jurisdiction. Since the defendant's insurer did business in New York, the plaintiff attached the insurance obligation of the insurer in New York. It was reasoned that since the insurer would have an obligation to pay any judgment which was rendered against the defendant, that obligation constituted a debt running from the insurer to the in-

[117] Mullane v. Central Hanover Bank and Trust, 339 U.S. 306 (1950).
[118] 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
[119] *Id.* at 313.

sured and hence could be attached.[120]

A storm of protest followed *Seider.*[121] An objection commonly heard was that since New York lacked a limited appearance rule, the defendant in such cases was forced to expose himself to liability in excess of the policy limits.[122] This objection was, however, eliminated by the holding of the New York Court of Appeals that such judgments would be limited to the value of the policy coverage.[123] A more substantial objection to the procedure employed in *Seider,* and one which led a federal district court to hold the procedure unconstitutional,[124] was that attachment should not be allowed since the debt being attached was unliquidated and was merely contingent on a finding of liability on the part of the insured. Yet, although these differences did on the surface distinguish the case from *Harris v. Balk,*[125] the Court of Appeals for the Second Circuit held that as long as *Harris v. Balk* stood as good law, the *Seider* procedure was constitutionally permissible.[126] Since the United States Supreme Court has in *Shaffer* overruled *Harris v. Balk,* it is necessary to determine the effect of that holding on *Seider.*

It might be questioned whether the holding of the Second Circuit in *Minichiello v. Rosenberg*[127] affirming the constitutionality of the *Seider* technique forecloses any contention that *quasi in rem* jurisdiction is available only when *in personam* jurisdiction would be constitutionally permissible. It is clear that no such possibility was considered by any of the courts which ruled on *Seider.*[128] This means that the possibility of finding *Seider* unconstitutional under the new theory of jurisdiction advocated in this article still exists. Yet, despite such

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[120] *Id.* at 315.

[121] For an example of such protest, see Rosenberg, *One Procedural Genie Too Many or Putting Seider Back in its Bottle,* 71 COLUM. L. REV. 660 (1971).

[122] R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 148 (1971).

[123] Simpson v. Loehmann, 234 N.E.2d 669, 671, 287 N.Y.S.2d 633, 637 (1967). This decision was necessary since without such a holding it had been possible that the insured would have lost his insurance coverage for non-cooperation had he not come to New York to aid in defense of the action. R. WEINTRAUB, *supra* note 122.

[124] Podolsky v. Devinney, 281 F. Supp. 488 (S.D.N.Y. 1968).

[125] 198 U.S. 215 (1905).

[126] Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968).

[127] *Id.*

[128] Even those opinions which felt *Seider* was unconstitutional did not rely on such a basis for their conclusions. *See* Podolsky v. Devinney, 281 F. Supp. 488 (S.D.N.Y. 1968).

a possibility, it is not necessary to conclude that the new theory or the holding in *Shaffer* makes the decision in *Seider* unconstitutional.

At first glance, limiting *quasi in rem* to situations in which *in personam* is constitutionally available would seem to require the overturning of *Seider*. Certainly, the state would have been unable to obtain long arm jurisdiction over the defendants in *Seider*.[129] On the other hand, it should be clear that the *Seider* type of jurisdiction is, in reality, a judicially created direct action procedure. Since the United States Supreme Court probably would uphold applications of direct action statutes against insurance companies when the injury sued upon occurred outside the forum and the policies involved were issued outside the forum,[130] it is very difficult to conclude that *Seider* could be unconstitutional. If the legislative branch of a state can create a direct action possibility for its citizens, it is absurd to think that the judicial branch cannot do likewise by creating a procedural device for implementing a course of action already in existence. By simply recognizing that the insurance company is the real defendant in such actions, whether the actions be *in personam* under a direct action statute or *quasi in rem* by attaching the contingent liability, the result in *Seider* is consistent with the new theory of *quasi in rem* jurisdiction. Viewed in this light, *Seider* merely used *quasi in rem* as a procedure for attacking the insurance company in a situation where *in personam* jurisdiction was constitutionally permissible but statutorily unavailable.[131] This usage is not only permitted under the new theory of *quasi in rem* jurisdiction, but the *Seider* technique illustrates the intended workings of such a theory.

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[129] *See* Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968); Simpson v. Loehmann, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

[130] That direct action statutes are constitutional is the indication given by Judge Fuld in Simpson v. Loehmann, 234 N.E.2d 669, 672, 287 N.Y.S.2d 633, 637 (1967), and the implication of Judge Desmond in Seider v. Roth, 216 N.E.2d 312, 315, 269 N.Y.S.2d 99, 102 (1966).

[131] *See* Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954), for the proposition that *in personam* jurisdiction is constitutionally permissible in such a case. In *Watson* suit was brought for injuries suffered in the forum.

VIII. *Shaffer* AND THE CHOICE OF LAW PROCESS

Still remaining for consideration are the implications of *Shaffer* which reach into the choice of law process. In this respect two aspects of the decision are particularly intriguing. First, the portions of the opinion which reject the basic territorialist notions of *Pennoyer* have implications in the area of conflicts; second, the portions of the opinion quoted earlier which deal with the correct application of law in the fact pattern of *Shaffer* (although such portions of the opinion are clearly dicta) are of importance in considering the relationship between the due process controls over choice of law (legislative jurisdiction) and those over adjudicatory authority (judicial jurisdiction).

The implications of rejecting the territorialist foundations of *Pennoyer* are obvious to anyone who has studied conflicts in the United States. The territorialist underpinnings of *Pennoyer* had their counterparts in the choice of law process.[132] Although the territorialist theory of conflicts has, in large part, been intellectually discredited in this country for some period of time, a substantial number of jurisdictions still retain territorialist notions as the basis of their vested rights choice of law systems.[133] It would seem, however, that if the territorialist notions of due process have once and for all been laid to rest in the area of judicial jurisdiction, it would make a good deal of sense to lay them to rest in the area of legislative jurisdiction as well. Although the United States Supreme Court has not for a considerable period of time heard a conflicts case, the time is ripe now for the Court to enter that field once more and to extend *Shaffer* into the choice of law area. An extension of *Shaffer* into the conflicts area would simply recognize that states can no more apply their own law based on territorial connections than they can exercise jurisdiction based on such connections. It is suggested here that the theoretical underpin-

[132] Those territorialist notions were embodied in RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

[133] The United States Supreme Court has long accepted territorial connection as a sufficient basis for making a particular choice of law. *See, e.g.*, Carrol v. Lanza, 349 U.S. 408 (1955). R. WEINTRAUB, *supra* note 122, at 234, however, indicates a rejection of vested rights in 21 jurisdictions. Since that statement is 6 years old, it is likely that more states have since abandoned vested rights.

ning of both legislative and judicial jurisdiction should be the same since the control of both areas comes from due process. Territorialism should be rejected.

Yet, if the philosophical foundations of both jurisdiction and conflicts reject territorialism, will the due process controls over choice of law necessarily be coextensive with the due process controls over judicial jurisdiction? As an initial reaction it appears that due process controls over choice of law should be more stringent than controls over judicial jurisdiction. In other words, it would seem that a state ought to have more connection with an action before it could apply its own law than would be necessary simply for it to act as a forum.[134] At most, it would seem that the due process controls over the two areas should be coextensive.[135] In no circumstance would it seem that a state would have the ability to apply its own law but would lack sufficient due process connections to exercise judicial jurisdiction. Yet this is exactly the import of a portion of the dicta of the Supreme Court in *Shaffer.*

In the majority opinion in *Shaffer,* it was noted:

> The interests appellee has identified may support the application of Delaware law to resolve any controversy over appellants' action in their capacities as officers and directors. But we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.[136]

Despite having held in *Shaffer* that the Delaware courts were without jurisdiction over the defendant directors, this quotation from the Court clearly indicates the majority felt the state had sufficient interest in the litigation to apply its own law. This, in turn, would indicate that an application of Delaware law to the controversy would not be violative of the due process control set by such cases as *Home Insurance Co. v. Dick.*[137] In

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[134] It would hardly seem accidental that the major due process case controlling the choice of law process involved a fact situation in which the state could not constitutionally obtain *in personam* jurisdiction. Home Ins. Co. v. Dick, 281 U.S. 397 (1930). Jurisdiction in that case was obtained by garnishment of reinsurance agreements issued by insurers doing business in Texas.

[135] Indeed, the position has been taken that the two lines of control have been converging into one. R. LEFLAR, AMERICAN CONFLICTS LAW 122 (1968).

[136] 45 U.S.L.W. at 1485.

[137] 281 U.S. 397 (1930). *See also* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964);

fact, the dicta of the Court in *Shaffer* is quite similar to language contained in *Hanson v. Denckla.*[138] In that case, the Court had indicated that the state of Florida had insufficient contact to exercise judicial jurisdiction over a Delaware trustee, yet that Florida law would be the correct law to be applied to the underlying controversy.[139] If taken literally, this would mean that it is possible for a state to have sufficient contact to satisfy due process controls for choice of law purposes, yet lack sufficient contact to satisfy due process control over judicial jurisdiction. However, it is not necessary to take the language in either *Shaffer* or *Hanson* literally.

As to the *Hanson* decision, it might first be noted that the trustee over whom Florida lacked jurisdiction was at most a nominal party to the litigation. Indeed, the Court itself noted that but for requirements of state law, there was no reason why the litigation in that case should not proceed without the trustee.[140] Under those circumstances, it is hardly surprising that the state of Florida had sufficient contacts to apply its own law as to the nominal party for choice of law purposes, but lacked sufficient contact to apply its own law for jurisdictional purposes. As to parties more substantially connected with the litigation process, it would appear doubtful that a state would ever have sufficient contact to apply its own law, yet lack sufficient contact to exercise jurisdiction.

The portion of the opinion in *Shaffer* dealing with the relationship of choice of law to jurisdiction can be regarded as unfortunately included. Since there would appear to be nothing in the controversy which required the Court to make the types of statements outlined above, it would not be at all unfair to characterize those portions of the Court's decision as gratuitous. If, as has been contended, the state of Delaware did indeed have sufficient contact to exercise *in personam* jurisdiction over the defendant directors,[141] then there would be no

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John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936).

[138] 357 U.S. 235 (1958).

[139] *Id.*

[140] *Id.* at 254.

[141] The reasons why the state of Delaware should have been held to have *in personam* jurisdiction have already been discussed at length, both in this article (*see* text accompanying notes 80-92 *supra)* and in the opinion of Mr. Justice Brennan. 45 U.S.L.W. at 4858 (Brennan, J., concurring in part and dissenting in part).

divergence between the choice of law limitations and the jurisdictional limitations.

A comparison of the different due process controls can better be drawn from *Gregg* than from *Shaffer*. As has been suggested earlier,[142] it was *Gregg* which was the easier of the two decisions, since it would appear that under no test could *in personam* jurisdiction have been exercised over *Gregg*. It would also appear that under no test of due process controls over choice of law could the law of the state of Delaware have been applied to the fact pattern in *Gregg*, since that fact pattern bears strong resemblances to *Home Insurance Co. v. Dick*.[143] Given that similarity, any attempt to apply Delaware law to the *Gregg* fact pattern would probably have been unconstitutional.

The entire area of the relationship between the due process controls over judicial jurisdiction and the due process controls over legislative jurisdiction would seem at this point to be ripe for reevaluation by the Supreme Court. Such an evaluation would better be made in a fact pattern in which legislative jurisdiction was actively contested. Attempts to formulate a test in fact patterns where only judicial jurisdiction is questioned is futile. The core concept of the two areas of control would appear to be the same. For the time being, therefore, it is wise to ignore the suggestions of the Court in both *Shaffer* and *Hanson* that states having sufficient contact for legislative jurisdiction may lack sufficient contact for judicial jurisdiction. This is a question best answered in the future, and it is hoped the question will be answered in a manner different from that which has been indicated in the dicta in both the above cases.

CONCLUSION: FINAL REFLECTIONS ON *Shaffer*

It is difficult only a short while after the decision of the

[142] *See* text accompanying note 102 *supra* for a discussion of why *Gregg* was the case which should have been reviewed by the United States Supreme Court.

[143] 281 U.S. 397 (1930). In *Home Insurance*, a contract to insure a boat in Mexican waters was issued in Mexico. All facts relevant to the contract took place outside Texas, which later became the forum for a suit on the insurance. The Court held that Texas could not apply its law to invalidate a policy provision limiting the time for bringing suit.

United States Supreme Court in *Shaffer* to put that decision into perspective; any decision of that magnitude will be clearly seen only in the future. A summation of what the decision does is staggering. The decision overrules *Harris v. Balk,* rebuts substantial portions of the dicta in *Pennoyer v. Neff,* and destroys the territorialist underpinnings of judicial jurisdiction. It works a substantial change over the law of judicial jurisdiction as it has been accepted in this country for the past 100 years. The implications of the decision for areas other than judicial jurisdiction are equally staggering. Further clarification of the area is still needed and, in particular, it is to be hoped that the Court will clarify the relationship between legislative jurisdiction and judicial jurisdiction.